United Nations A/CN.9/WG.IV/WP.127

General Assembly

Distr.: Limited
5 February 2014

Original: English

United Nations Commission on International Trade Law
Working Group IV (Electronic Commerce)
Forty-ninth session
New York, 28 April-2 May 2014

Annotated provisional agenda

I. Provisional agenda

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Legal issues relating to the use of electronic transferable records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

II. Composition of the Working Group

1. The Working Group is composed of all States members of the Commission, which are the following: Algeria (2016), Argentina (2016), Armenia (2019), Australia (2016), Austria (2016), Belarus (2016), Botswana (2016), Brazil (2016), Bulgaria (2019), Cameroon (2019), Canada (2019), China (2019), Colombia (2016), Côte d'Ivoire (2019), Croatia (2016), Denmark (2019), Ecuador (2019), El Salvador (2019), Fiji (2016), France (2019), Gabon (2016), Georgia (2015), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2016), Indonesia (2019), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2019), Jordan (2016), Kenya (2016), Kuwait (2019), Liberia (2019), Malaysia (2019), Mauritania (2019), Mauritius (2016), Mexico (2019), Namibia (2019), Nigeria (2016), Pakistan (2016), Panama (2019), Paraguay (2016), Philippines (2016), Republic of Korea (2019), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2016), Switzerland (2019), Thailand (2016), Turkey (2016), Uganda (2016),

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Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2016), Venezuela (Bolivarian Republic of) (2016) and Zambia (2019). The term of the membership expires on the last day prior to the beginning of the annual session of the Commission in the year indicated in parentheses.

2. States, not members of the Commission, and international governmental organizations may attend the session as observers and participate in the deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

III. Annotations to agenda items

Item 1. Opening of the session

3. The forty-ninth session of the Working Group will be held at the United Nations Headquarters in New York, from 28 April to 2 May 2014. Meeting hours will be from 10.00 a.m. to 1.00 p.m. and from 3.00 to 6.00 p.m., except on Monday, 28 April 2014, when the session will be opened at 10.30 a.m.

4. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,[1] the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon).

Item 2. Election of officers

5. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Legal issues relating to the use of electronic transferable records

(a) Background information

6. At its forty-second session, in 2009, the Commission requested the Secretariat to prepare a study on electronic transferable records in the light of proposals received at that session (A/CN.9/681 and Add.1, and A/CN.9/682).[2]

7. At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras. 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with

[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 381.

[2] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 343.

mobile devices and electronic single window facilities, and to report on the discussions held at that colloquium.[3]

8. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions at the colloquium on electronic commerce (New York, 14-16 February 2011).[4] After discussion, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[5] It was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade, but also to address some specific issues such as assisting in the implementation of the Rotterdam Rules.[6]

9. In addition, the Commission agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.[7] However, as to the extension of the mandate of the Working Group to such topics as discrete subjects (and not incidental to electronic transferable records), the Commission agreed to discuss it at a future session.[8]

10. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group (A/CN.9/737, paras. 14-88). It also considered the work of other international organizations on this subject (A/CN.9/737, paras. 89-91).

11. At the forty-fifth session of the Commission, in 2012, there was general support for the Working Group to continue its work on electronic transferable records and the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.[9] In that context, the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was mentioned.[10] After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records.[11]

12. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the legal issues relating to the use of electronic transferable records. At the outset, the Working Group confirmed the desirability of continuing work on electronic transferable records and the potential usefulness of guidance in that field and it was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18). Thereafter, the Working Group considered various legal issues that arise during the life cycle of electronic transferable records

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[3] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 250.

[4] Information about the colloquium is available at the date of this document from www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.

[5] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[6] Ibid., para. 235.

[7] Ibid.

[8] Ibid., para. 239.

[9] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 83.

[10] Ibid.

[11] Ibid., para. 90.

(A/CN.9/761, paras. 24-89). As to future work, broad support was expressed for the preparation of draft provisions on electronic transferable records to be presented in the form of a model law, without prejudice to the decision on the form of its work to be made by the Working Group (A/CN.9/761, paras. 90-93).

13. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began its consideration of the draft provisions as presented in document A/CN.9/WG.IV/WP.122. It was expressed that the rules enabling the use of electronic transferable records would interact with general provisions on the use of electronic transactions, and that further harmonization of those general provisions would be highly desirable (A/CN.9/768, para. 15). As to future work, it was noted that although it was premature to discuss the final form of work, the draft provisions were largely compatible with different outcomes that could be achieved (A/CN.9/768, para. 112).

14. At its forty-sixth session, the Commission took note of the progress being made by the Working Group with respect to electronic transferable records.[12] Recognizing that the current work of the Working Group would greatly assist in facilitating electronic commerce in international trade, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records.[13]

15. At its forty-eighth session (Vienna, 9-13 November 2013), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.124 and its addendum. The Working Group also took into consideration the legal issues related to the use of electronic transferable records as presented in document A/CN.9/WG.IV/WP.125.

(b) Documentation

16. The Working Group will have before it notes by the Secretariat presenting the draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.128 and its addendum).

17. A limited number of the following background documents will be made available at the session:

- UNCITRAL Model Law on Electronic Commerce with Guide to Enactment;
- UNCITRAL Model Law on Electronic Signatures with Guide to Enactment;
- United Nations Convention on the Use of Electronic Communications in International Contracts;
- Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods;
- Present and possible future work on electronic commerce (A/CN.9/692);
- Present and possible future work on electronic commerce (A/CN.9/728 and Add.1);
- Report of Working Group IV (Electronic Commerce) on the work of its forty-fifth session (A/CN.9/737);

[12] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 223-226.
[13] Ibid., paras. 227 and 230.

- A note by the Secretariat on legal issues relating to the use of electronic transferable records (A/CN.9/WG.IV/WP.118 and Add.1);
- Legal issues relating to the use of electronic transferable records — Proposal by the Governments of Colombia, Spain and the United States (A/CN.9/WG.IV/WP.119);
- Report of the Working Group IV (Electronic Commerce) on the work of its forty-sixth session (A/CN.9/761);
- Draft provisions of electronic transferable records (A/CN.9/WG.IV/WP.122);
- Report of Working Group IV (Electronic Commerce) on the work of its forty-seventh session (A/CN.9/768);
- Draft provisions of electronic transferable records (A/CN.9/WG.IV/WP.124 and Add.1);
- A note by the Secretariat on legal issues relating to the use of electronic transferable records (A/CN.9/WG.IV/WP.125); and
- Report of Working Group IV (Electronic Commerce) on the work of its forty-eighth session (A/CN.9/797).

18. UNCITRAL documents are posted on the UNCITRAL website (www.uncitral.org) upon their issuance in all official languages of the United Nations. Delegates may wish to check the availability of the documents by accessing the Working Group's page in the "Working Groups" section of the UNCITRAL website.

Item 5. Technical assistance and coordination

19. In addition, the Working Group will hear an oral report of technical assistance and coordination activities undertaken by the Secretariat, including the promotion of UNCITRAL texts on electronic commerce.

Item 6. Other business

20. The fiftieth session of the Working Group is scheduled to be held in Vienna from 10 to 14 November 2014, those dates being subject to confirmation by the Commission at its forty-seventh session, scheduled to be held in New York from 7 to 25 July 2014.

Item 7. Adoption of the report

21. The Working Group may wish to adopt, at the close of its session, on Friday, 2 May 2014, a report for submission to the forty-seventh session of the Commission scheduled to be held in New York, from 7 to 25 July 2014. The main conclusions reached by the Working Group at its ninth meeting (on Friday morning) will be summarily read out for the record at the tenth meeting (on Friday afternoon) and subsequently incorporated into the report.

United Nations A/CN.9/WG.IV/WP.128

General Assembly

Distr.: Limited
14 February 2014

Original: English

United Nations Commission on International Trade Law
Working Group IV (Electronic Commerce)
Forty-ninth session
New York 28 April-2 May 2014

Draft provisions on electronic transferable records

Note by the Secretariat

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I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.[1]

2. At its forty-sixth session (Vienna, 29 October-2 November 2012), broad support was expressed by the Working Group for the preparation of draft provisions on electronic transferable records, to be presented in the form of a model law without prejudice to the decision on the form of its work to be made by the Working Group (A/CN.9/761, paras. 90-93).

3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began reviewing the draft provisions on electronic transferable records as provided in document A/CN.9/WG.IV/WP.122 and noted that while it was premature to start a discussion on the final form of work, the draft provisions were largely compatible with different outcomes that could be achieved.

4. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its consideration of the draft provisions as provided in A/CN.9/WG.IV/WP.124 and Add.1. Part II of this note contains the draft provisions reflecting the deliberations and decisions of the Working Group during that session (A/CN.9/797, paras. 16-114).

II. Draft provisions on electronic transferable records

A. General

"Draft article 1. Scope of application

"1. This Law applies to electronic transferable records.

"2. Nothing in this Law affects the application of any rule of law governing a paper-based transferable document or instrument to an electronic transferable record other than as provided for in this Law.

"[3. This Law applies to electronic transferable records other than as provided by [law governing a certain type of electronic transferable record to be specified by the enacting State].]"

Remarks

5. Draft article 1 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 16-17).

6. Draft article 1, paragraph 3, is placed in square brackets as it would only be applicable in States that have enacted legislation on electronic transferable records that exist only in an electronic environment. In such case, paragraph 3 aims at allowing the application of the draft provisions also to those electronic transferable records, without interfering with their substantive law. Hence, this paragraph would not be necessary in jurisdictions where no such electronic transferable record exists.

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

The Working Group agreed that a decision on paragraph 3 could only be made in light of the final form of the draft provisions, which has not yet been determined (A/CN.9/797, para. 17).

"Draft article 2. Exclusion

"1. This Law does not override any rule of law applicable to consumer protection.

"2. This Law does not apply to securities, such as shares and bonds, and other investment instruments.

"3 [This Law does not apply to bills of exchange, promissory notes and cheques.]"

Remarks

7. Draft article 2 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 18-20). The term "investment instrument" is understood to include derivative instruments, money market instruments and any other financial product available for investment (A/CN.9/797, para. 19).

8. As a reference, the Working Group may wish to compare the language used in the Regulation (EC) No 864/2007 of the European Parliament ("Rome II Regulation"),[2] to exclude from the application of the Rome II Regulation "non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character". Therefore, it is understood that "other transferable documents, such as investment securities and loans"[3] fall within the scope of the Rome II Regulation. However, the ultimate result may depend on domestic law, as, for instance, in certain jurisdictions shares and bonds are considered negotiable instruments and would therefore be excluded from the scope of the Rome II Regulation.

9. Paragraph 3 reflects the view that, if the final form of the draft provisions were a treaty, certain paper-based transferable documents or instruments should be excluded from its scope of application in order to avoid conflicts with other treaties such as the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the "Geneva Conventions") (A/CN.9/797, paras. 20, 109-112; see also A/CN.9/WG.IV/WP.125).

10. Moreover, if the final form of the draft provision were a model law, the Working Group may wish to consider whether paragraph 3 should be retained to provide guidance to those jurisdictions that are parties to the Geneva Conventions as well as any other relevant conventions when they wish to enact that model law.

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[2] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II Regulation"), Official Journal L 199, 31/7/2007, P. 40-49.

[3] See Philip R. Wood, Conflict of Laws and International Finance (The Law and Practice of International Finance, Vol. 6), 2007, sub 11-043.

"Draft article 3. Definitions

"For the purposes of this Law:

Remarks

11. The definitions in draft article 3 have been prepared as a reference and should be examined in the context of the relevant draft articles. The terms are presented in the order they appear throughout the draft provisions (A/CN.9/768, para. 34). Remarks for consideration by the Working Group have been placed after each definition.

12. In addition to the remarks below, the Working Group may wish to clarify in draft article 3 that a "person" may either be a natural or a legal person.

"*electronic transferable record*" means [an electronic record] that entitles the holder to claim the performance of the obligation [indicated] in the record and that is capable of transferring the right to performance of the obligation [indicated] in the record through the transfer of that record.

["*paper-based transferable document or instrument*" means a transferable document or instrument issued on paper that entitles the holder to claim the performance of the obligation [indicated] in the document or instrument and that is capable of transferring the right to performance of the obligation [indicated] in the document or instrument through the transfer of that document or instrument.]

[Paper-based transferable documents or instruments include bills of exchange, cheques, promissory notes, [consignment notes,] bills of lading and warehouse receipts.]

Remarks

13. The definitions of "electronic transferable record" and "paper-based transferable document or instrument" reflect the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 21-28). These definitions do not aim at affecting the fact that substantive law shall determine whether the holder is the rightful holder and the substantive rights of the holder.

14. The Working Group confirmed that certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, such as straight bills of lading, would not fall under either of these two definitions, and that the draft provisions should only focus on "transferable" documents (A/CN.9/797, para. 27-28).

15. The Working Group may wish to consider whether the term "[indicated]" in square brackets in both definitions is appropriate or whether other terms might be used such as "incorporated", "specified" or "contained" (A/CN.9/797, para. 22).

16. The Working Group may wish to refer to the definition of "electronic record" when considering the definition of "electronic transferable record".

17. The Working Group may wish to consider deleting the definiti n of paper-based transferable document or instrument as it deals with substantive law matters.

18. The Working Group may wish to consider whether the indicative list of paper-based transferable documents or instruments, along the lines contained in article 2, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the "Electronic Communications Convention"), should be included in the definition of "paper-based transferable document or instrument" or in explanatory material (A/CN.9/768, para. 34 and A/CN.9/797, paras. 25 and 26). The Working Group may also wish to consider whether to retain the reference to consignment notes, which are not transferable in certain jurisdictions.

"*electronic record*" means information generated, communicated, received or stored by electronic means[, including, where appropriate, all information logically associated or otherwise linked [together] [thereto] [so as to become part of the record], whether generated contemporaneously or [not] [subsequently].

Remarks

19. The definition of "electronic record" is based on the definition of "data message" contained in the UNCITRAL Model Law on Electronic Commerce, 1996, and in the Electronic Communications Convention, yet highlighting the fact that other information might be associated with the electronic transferable record at the time of issuance or thereafter (e.g., information related to endorsement) (A/CN.9/797, paras. 43-45). The bracketed text is meant to clarify that some electronic records could, but do not need to, include a set of composite information (A/CN.9/797, para. 43).

"*issuer*" means a person that issues [directly, or with the assistance of a third party,] an electronic transferable record [on its own behalf].

Remarks

20. The Working Group may wish to consider whether to retain the definition of "issuer" in light of the deletion of a draft provision on issuance (A/CN.9/797, paras. 64-67).

21. If the definition of "issuer" is retained, the Working Group may wish to consider whether it should add to that definition the words [directly, or with the assistance of a third party], which aim at clarifying that when an electronic transferable record is issued by a third party upon the issuer's request, the third party is not considered an issuer under the draft provisions.

"*control*" of an electronic transferable record means the [de facto power to deal with or dispose of that electronic transferable record] [power to factually deal with or dispose of the electronic transferable record] [control in fact of the electronic transferable record].

Remarks

22. The Working Group suggested that a definition of "control" could be added (A/CN.9/797, para. 83).

"*holder*" of an electronic transferable record is a person in control of the electronic transferable record [in accordance with article 18].

Remarks

23. The Working Group may wish to consider whether the definition of holder accurately reflects the Working Group's conclusion (A/CN.9/768, para. 86) and clarifies that a holder of an electronic transferable record would need to have only control of the electronic transferable record to be considered a holder. Whether the person in control is the rightful holder and the substantive rights of the holder are matters for the substantive law (A/CN.9/WG.IV/WP.122, paras. 29 and 31).

24. The Working Group may wish to consider whether the words [in accordance with article 18] should be deleted to capture instances in which the holder did not receive control from a transferor, e.g., in case of theft of an electronic transferable record.

"*transfer*" of an electronic transferable record means the transfer of control over an electronic transferable record.

Remarks

25. The Working Group may wish to consider whether to retain this definition in light of draft article 23 on transfer.

"*amendment*" means the modification of information contained in the electronic transferable record in accordance with the procedure set out in draft article 24.

Remarks

26. The Working Group may wish to consider whether to retain this definition in light of draft article 24 on amendment and the remarks to that draft article.

"*performance of obligation*" means the delivery of goods or the payment of a sum of money as specified in a paper-based transferable document or instrument or an electronic transferable record.

Remarks

27. The Working Group may wish to consider whether to retain this definition, which refers generally to the delivery of goods or the payment of a sum of money as mentioned in article 2, paragraph 2, of the Electronic Communications Convention (A/CN.9/761, para. 22).

"*obligor*" means the person specified in a paper-based transferable document or instrument or an electronic transferable record who has the obligation to perform.

Remarks

28. The Working Group may wish to consider whether the definition of "obligor" should be retained in light of the fact that that notion may be defined under substantive law. In case of retention of that definition, the Working Group may wish to further clarify in the definition that substantive law would address who the obligor is.

"*replacement*" means substitution of a paper-based transferable document or instrument with an electronic transferable record or [vice versa] [conversely].

Remarks

29. The Working Group may wish to consider whether the definition should be limited to instances where there is change only in the medium in accordance with the procedure set out in draft article 26 or whether it should be broadened to include instances where an electronic transferable record was issued to substitute for another electronic transferable record (see A/CN.9/WG.IV/WP.124/Add.1, para. 27).

> "*third-party service provider*" means a third party providing services related to [the use of] electronic transferable records in accordance with articles 31 and 32."

30. The Working Group may wish to consider whether the words [the use of] should be deleted to ensure consistency with the definition of "certificate service provider" contained in article 2(e) of the UNCITRAL Model Law on Electronic Signatures (2001).

> ***"Draft article 4. Interpretation***
>
> "1. This Law is derived from [...] of international origin. In the interpretation of this Law, regard is to be had to the international origin and to the need to promote uniformity in its application [and the observance of good faith].
>
> "2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

Remarks

31. Draft article 4 is intended to draw the attention of courts and other authorities to the fact that the draft provisions should be interpreted with reference to their international origin in order to facilitate their uniform interpretation (A/CN.9/768, para. 35). The square bracketed text in paragraph 1 would depend on the final form of the draft provisions and the paragraph itself would need to be revised accordingly.

32. While the term "general principles" in paragraph 2 has been used in several UNCITRAL texts, article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG") is the provision containing that term that has been most interpreted by case law.

33. The UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012) lists several general principles relevant to article 7 of the CISG according to case law, including: party autonomy; estoppel; place of payment of monetary obligations; mitigation of damages; and *favor contractus*. Those general principles are contained in specific provisions of the CISG and applied in other cases falling under the scope of the CISG.

34. However, not all the general principles that have been identified in the CISG gather the same level of support in being recognized as such. Moreover, determination of the content and operation of those general principles takes place progressively. Such progressive determination assists in ensuring flexibility in interpreting the CISG and adapting it to evolving commercial practices and business needs.

35. The notion of "general principles" contained in draft article 4 paragraph 2 refers to the general principles of electronic transactions (A/CN.9/797, para. 29), including those already stated in relevant UNCITRAL texts. In this line, the Working Group may wish to confirm that the three fundamental principles of non-discrimination of electronic communications, technological neutrality and functional equivalence should be considered as general principles underlying the draft provisions. Some of the general principles underlying the CISG, such as party autonomy and good faith, may also be relevant. In that respect, the Working Group may wish to consider whether a reference to good faith should be retained in the context of the draft provisions also in light of the fact that it is contained in other UNCITRAL texts on electronic commerce. Other general principles might be identified as the work of the Working Group makes progress.

"Draft article 5. Party autonomy [and privity of contract]

"1. The parties may derogate from or vary by agreement the provisions of this Law [except articles 6, 7 and ...]

"2. Such an agreement does not affect the rights of any person that is not a party to that agreement."

Remarks

36. The Working Group highlighted the importance of party autonomy in the draft provisions (A/CN.9/797, para. 30) and, based on the general applicability of that principle, agreed to identify which draft articles could not be derogated from (A/CN.9/797, para. 32). It is suggested that such identification should be carried out at a later stage of preparation of the draft provisions, pending, in particular, discussion on the provisions relating to third-party service providers.

"Draft article 6. Information requirements

"Nothing in this Law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard."

37. The Working Group decided to retain draft article 6 with the understanding that it reminds parties of the need to comply with possible disclosure obligations that might exist under other law (A/CN.9/797, para. 33).

B. Provisions on electronic transactions

"Draft article 7. Legal recognition of an electronic transferable record

"An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form."

"Draft article 8. Writing

"Where the law requires that information should be in writing or provides consequences for the absence of a writing, that requirement is met with respect to the use of an electronic transferable record if the information contained

in the electronic transferable record is accessible so as to be usable for subsequent reference."

Remarks

38. Draft article 8 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 36-39).

39. The Working Group may wish to confirm that the words "information contained therein" refer to the information contained in an electronic transferable record, and that general electronic transactions law would establish functional equivalence for writing requirements when the information is not contained in the electronic transferable record.

"Draft article 9. Signature

"Where the law requires a signature of a person or provides consequences for the absence of a signature, that requirement is met with respect to the use of an electronic transferable record if:

(a) A method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic transferable record; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic record was generated, in the light of all the relevant circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence."

Remarks

40. Draft article 9 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 40-46).

41. The Working Group may wish to consider draft article 9 in conjunction with the revised definition of the term "electronic record" contained in draft article 3.

Draft articles on original, uniqueness and integrity

42. At the forty-eighth session of the Working Group, it was noted that the notion of "original" in the context of electronic transferable records was different from that adopted in other UNCITRAL texts (A/CN.9/797, para. 47).

43. With respect to the notion of uniqueness, at that session support was expressed for the view that uniqueness was not a general requirement for electronic transferable records and that in practice, it could be very difficult to achieve uniqueness in an electronic environment. In that line, uniqueness should not be perceived as a quality on its own and emphasis should rather be on the function that uniqueness achieves, namely, prevention of multiple claims. Various methods to replicate that function existed in an electronic environment that did not necessarily require uniqueness. In some cases, the notion of control could suffice to prevent the

risk of exposing the debtor (obligor) to multiple requests for performance (A/CN.9/797, paras. 48 and 50).

44. The following options reflect the discussion by the Working Group at its forty-eighth session on the possible formulations of the draft articles on original, uniqueness and integrity (A/CN.9/797, paras. 58-59).

Option A

"Draft article 10. Original

"Where the law requires [the original of] a paper-based transferable document or instrument, or provides consequences for [the absence of the original] [its absence], that requirement is met with respect to the use of an electronic transferable record if a reliable method is employed:

(a) [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication] [in accordance with draft article 11]; and

(b) to retain the integrity of the electronic transferable record [from the time of its issuance, apart from the additions of any change that arises throughout the life cycle of the electronic transferable record] [in accordance with draft article 12]."

"Draft article 11. Uniqueness of an electronic transferable record

"1. A reliable method shall be employed [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication].

"2. A method satisfies paragraph 1, if it:

(a) Designates an authoritative copy of an electronic transferable record, which is readily identifiable as such; and

(b) Ensures that the authoritative copy of an electronic transferable record cannot be reproduced."

"3. For the purposes of paragraph 1, the standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances."

"Draft article 12. Integrity of an electronic transferable record

"1. A reliable method shall be employed to retain the integrity of an electronic transferable record from its issuance.

"2. For the purposes of paragraph 1:

(a) The criteria for assessing integrity shall be whether the information contained in the electronic transferable record has remained complete and

unaltered, apart from the addition of any change that arises throughout the life cycle of the electronic transferable record; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances."

Remarks

45. Under option A, draft article 10 aims at establishing a rule on functional equivalence between electronic transferable records and the original of a paper-based transferable document or instrument (A/CN.9/797, paras. 47 and 52; see also A/CN.9/768, paras. 49 and 50).

46. Draft article 10 aims at providing a functional equivalence of the notion of "original" specific to electronic transferable records by incorporating the elements of integrity and uniqueness. The Working Group may wish to consider whether draft articles 11 and 12 should also be retained, and in what form.

47. The wording of draft article 10 departs from that of article 8 of the Model Law on Electronic Commerce and article 9 of the Electronic Communications Convention because of the different notion of "original" in the context of electronic transferable records (see para. 42 above).

48. The Working Group may wish to consider whether reference to "the original of" is necessary in draft article 10, paragraph 1, in light of the possible lack of reference to "original" in the substantive law (A/CN.9/797, paras. 53-55).

49. The words [from the time of its issuance, apart from the additions of any change that arises throughout the life cycle of the electronic transferable record] have been added as a possible drafting suggestion to better capture the notion of "original" as applied to a paper-based transferable document or instrument. The Working Group may wish to further discuss the matter also in relation with the notion of "integrity".

50. The second set of bracketed text in draft article 10(a) aims at addressing a concern on the technical implementation of the notion of uniqueness (A/CN.9/797, para. 57).

51. The words [prevent unauthorized replication of an electronic transferable record] have been added as a drafting option in draft article 11 to reflect the function of uniqueness, which is preventing unauthorized replication of the electronic transferable record, rather than the notion of uniqueness per se. This approach might be preferable in light of the fact that certain systems, such as those registry-based, may not need a method to achieve uniqueness but can prevent unauthorized replication otherwise (A/CN.9/797, para. 50).

52. The Working Group may wish to discuss the relation between the notions of "copy", "replication" and "reproduction".

53. The Working Group at its forty-eighth session decided to retain draft articles 7-10 as a separate section (A/CN.9/797, para. 34). The Working Group may wish to review its decision in light of the final form of the draft provisions as well as the content of draft articles 10, 11 and 12.

Option B

"Draft article 10. Original

"1. Where the law requires [the original of] a paper-based transferable document or instrument, or provides consequences for [the absence of the original] [its absence], that requirement is met with respect to the use of an electronic transferable record if a reliable method is employed:

(a) [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication]; and

(b) to retain the integrity of the electronic transferable record.

"2. For the purposes of subparagraph 1(a), the criteria for assessing uniqueness shall be:

(a) whether the electronic transferable record is identified as containing the authoritative information constituting the electronic transferable record; and

(b) whether its unauthorized replication is prevented.

"3. For the purposes of subparagraph 1(b):

(a) The criteria for assessing integrity shall be whether the information contained in the electronic transferable record has remained complete and unaltered, apart from the addition of any change that arises throughout the life cycle of the electronic transferable record; and

(b) The standard of reliability required for integrity shall be assessed in the light of the purpose for which the information contained in the electronic transferable record was generated and in the light of all the relevant circumstances."

54. Draft article 10 of Option B provides a functional equivalence rule for the "original" requirement with the notions of uniqueness and integrity supporting such a rule (A/CN.9/797, para. 58). Under Option B, draft articles 10, 11 and 12 of Option A would be merged (A/CN.9/797, para. 58). The Working Group may wish to refer to paragraphs 45-53 above when considering Option B.

55. The Working Group may wish to consider introducing the provision contained in draft article 11, paragraph 2 of Option A in draft article 10 of Option B.

Option C

"Draft article 10. Original

"Where the law requires [the original of] a paper-based transferable document or instrument, or provides consequences for the absence [of the original] [its absence], that requirement is met with respect to the use of an electronic transferable record if a reliable method is employed:

(a) [to render the electronic transferable record unique, or to identify the electronic transferable record as containing the authoritative information

constituting the electronic transferable record] [to render the electronic transferable record identifiable as such and to prevent its unauthorized replication]; and

(b) to retain the integrity of the electronic transferable record [from the time of its issuance, apart from the additions of any change that arises throughout the life cycle of the electronic transferable record]."

"Draft article 11. General reliability standard

"1. In determining reliability for the purposes of [articles 10, 18, 24, 27, 28 and 29 and ...] regard shall be had to the extent to which the method employed is able to ensure data integrity and to prevent unauthorized access to and use of the [system] [method].

"2. In determining whether, or to what extent, a method is reliable for the purposes of [articles 10, 18, 24, 27, 28 and 29 and ...], regard may be had to the following factors:

(a) Level of assurance of data integrity;

(b) Ability to prevent unauthorized access to and use of the system;

(c) Quality of hardware and software systems;

(d) Regularity and extent of audit by an independent body;

(e) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method; or

(f) Any other relevant factor."

Remarks

56. A third drafting suggestion was to recast draft articles 10, 11 and 12 as two draft articles, one providing a functional equivalence rule for "original" and another providing the reliability test for uniqueness and integrity (A/CN.9/797, para. 59). The Working Group may wish to refer to paragraphs 45-50 and 53 above when considering Option C.

57. Draft article 11 aims to offer guidance on possible elements to be considered when assessing reliability of a method used during the life cycle of an electronic transferable record. The Working Group may wish to consider draft article 11 in conjunction with draft article 19, dealing with reliability of method of control. The Working Group may also wish to consider deleting the words [articles 10, 18, 24, 27, 28 and 29 and ...] so as to provide a general reliability test that could be added to the draft provisions.

58. Draft article 11, paragraph 2 is inspired by article 10 of the UNCITRAL Model Law on Electronic Signatures, which provides guidance on how to assess trustworthiness of systems, procedures and human resources used by a certification service provider (A/CN.9/797, para. 89).

United Nations A/CN.9/WG.IV/WP.128/Add.1

General Assembly

Distr.: Limited
17 February 2014

Original: English

United Nations Commission on International Trade Law
Working Group IV (Electronic Commerce)
Forty-ninth session
New York 28 April-2 May 2014

Draft provisions on electronic transferable records

Note by the Secretariat

Addendum

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II. Draft provisions on electronic transferable records (*continued*)

C. Use of electronic transferable records

"***Draft article 13. Time and place of dispatch and receipt of electronic transferable records***

"1. The time of dispatch of an electronic transferable record is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic transferable record has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic transferable record is received.

"2. The time of receipt of an electronic transferable record is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic transferable record at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic transferable record has been sent to that address. An electronic transferable record is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

"3. An electronic transferable record is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business.

"4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic transferable record is deemed to be received under paragraph 3 of this article."

Remarks

1. At the Working Group's forty-eighth session, it was suggested that a provision on time and place of dispatch and receipt of electronic transferable records, based on article 10 of the Electronic Communications Convention, should be added to the draft provisions (A/CN.9/797, para. 61).

2. The Working Group may wish to consider whether draft article 13, based on a provision designed for the exchange of electronic communications, could adequately provide for electronic transferable records. In particular, the Working Group may wish to clarify its operation in registry systems, which may be considered as a single information system, but where an electronic transferable record might circulate without being sent to or received at an electronic address. Moreover, substantive law on registry-based systems might contain a rule with respect to third parties based on the availability of information in that system, regardless of that information being communicated (see Recommendation 70 of the UNCITRAL Legislative Guide on Secured Transactions (2007)).

3. In the same line, the Working Group may wish to consider the applicability of the draft article to instances when the electronic transferable record, for example in a token-based system, may be transferred by transmission of its storage medium (e.g., USB key or smart card).

4. The Working Group may further wish to consider defining the terms "originator", "addressee" and "electronic address". In this respect, for instance, the Working Group may wish to discuss the relationship between "originator", "issuer", and "transferor" (see also A/CN.9/768, paras. 68-69).

"***Draft article 14. Consent to use an electronic transferable record***

"1. Nothing in this Law requires a person to use an electronic transferable record without its consent.

"2. The consent of a person to use an electronic transferable record may be inferred from the person's conduct."

Remarks

5. Draft article 14 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 62-63).

["***Draft article 15. Issuance of multiple originals***

"Where the law permits the issuance of more than one original of a paper-based transferable document or instrument, this may be achieved with respect to the use of electronic transferable records by ..."]

Remarks

6. Draft article 15 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 47 and 68). The Working Group may wish to consider whether this draft article should be retained or if the functions performed by multiple originals in a paper-based environment may be achieved otherwise in an electronic environment.

7. Draft articles 15 and 16 are the only provisions dealing with the issuance of electronic transferable records in the draft provisions (A/CN.9/797, paras. 64-69). With respect to the possibility of issuing an electronic transferable record to bearer, draft article 1, paragraph 2 would facilitate such issuance (A/CN.9/797, para. 65).

"***Draft article 16. Substantive information requirements of electronic transferable records***

"Nothing in this Law requires additional information for the issuance of an electronic transferable record beyond that required for the issuance of a paper-based transferable document or instrument."

Remarks

8. Draft article 16 reflects a decision of the Working Group at its forty-eighth session (A/CN.9/797, para. 73). It states that no additional substantive information is required for the issuance of an electronic transferable record, if that

information is not required for a corresponding paper-based transferable document or instrument.

9. The Working Group may wish to clarify that the information requirement contained in draft article 26(1)(b) (and set forth with respect to paper-based documents or instruments in draft article 26(2)(b)) does not represent an exception to this rule, as those provisions aim at ensuring the perduring availability of information in case of change of medium.

"***Draft article 17. Additional information in electronic transferable records***

"Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in a paper-based transferable document or instrument."

Remarks

10. Draft article 17 states that throughout its life cycle, an electronic transferable record may contain information in addition to that contained in a paper-based transferable document or instrument due to the dynamic nature of electronic transferable records (A/CN.9/768, para. 66 and A/CN.9/797, para. 73).

"***Draft article 18. Possession***

"1. Where the law requires the possession of a paper-based transferable document or instrument, or provides consequences for the absence of possession, that requirement is met through the [de facto] control of an electronic transferable record, which shall be established by a reliable method.

"2. An electronic transferable record is subject to control from the time of its issuance until it ceases to have any effect or validity."

Remarks

11. Draft article 18 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, para. 83).

12. The Working Group may wish to consider deleting the words [de facto] in light of the definition of "control" contained in draft article 3 (A/CN.9/797, para. 83).

13. Paragraph 2 has been added to introduce the requirement that control be exercised throughout the life cycle of the electronic transferable record. The Working Group may wish to consider whether the words [from the time of its issuance] should be inserted in paragraph 2 in light of the fact that the draft provisions do not contain a separate provision on issuance.

Draft article 19. Reliability of method for establishing control

14. At the forty-eighth session of the Working Group, three options were suggested with respect to the reliability of the method establishing control (A/CN.9/797, paras. 85-90): (i) a "safe harbour" rule ("Option X"); (ii) a rule containing mandatory minimum requirements for establishing reliability

("Option Y"); and (iii) a rule offering guidance on elements to be considered when assessing reliability.

15. With respect to the rule offering guidance on elements to be considered when assessing reliability, the Working Group may wish to consider the adoption of a general rule on reliability such as the one contained in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58).

16. In making its deliberations, the Working Group may wish to refer to the definitions of "control" and "holder" contained in draft article 3.

"***Option X***

"A method satisfies draft article 18, and a person is deemed to have control of an electronic transferable record, if the electronic transferable record is issued and transferred in such a manner that:

(a) The uniqueness and integrity of the electronic transferable record are preserved in accordance with draft articles [11 and 12 of Option A];

(b) The electronic transferable record identifies the person [asserting control] [who, directly or indirectly, has [de facto] control over the record]; and

(c) The electronic transferable record is maintained by the person asserting control."

Remarks

17. Option X of draft article 19 aims at providing a safe harbour provision on the reliability of the method used to establish control over an electronic transferable record.

18. Subparagraph (b) of Option X offers alternative language to refer to the person in control (A/CN.9/797, para. 90; see also A/CN.9/WG.IV/WP.124/Add.1, para. 6).

"***Option Y***

"For the purposes of draft articles [11 and 12 of Option A and 18], a method is reliable when it prevents unauthorized access and use and ensures [data] integrity [of the electronic transferable record]."

Remarks

19. Option Y of draft article 19 aims at setting forth mandatory minimum requirements of a reliable method. In doing so, that draft provision may provide general guidance on the interpretation of the notion of "reliable method".

20. The Working Group may wish to discuss whether Option Y should explicitly refer to unauthorized access and use of the system or of the method. The Working Group may also wish to discuss whether paragraph 1 should refer to data integrity in the system or to integrity of the electronic transferable record.

"***Draft article 20. Delivery***

"Where the law requires the delivery of a paper-based transferable document or instrument or provides consequences for the absence of delivery, that requirement is met with respect to the use of an electronic transferable record through the transfer of control of an electronic transferable record."

"***Draft article 21. Presentation***

"Where the law requires the presentation of a paper-based transferable document or instrument or provides consequences for the absence of presentation, that requirement is met with respect to the use of an electronic transferable record by demonstrating that the person has control of the electronic transferable record."

Remarks

21. Draft articles 20 and 21 reflect the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 91-94), and, in particular, the decision to have separate articles on delivery and presentation (A/CN.9/797, para. 93).

"***Draft article 22. Endorsement***

"Where the law requires [or permits] the endorsement of a paper-based transferable document or instrument or provides consequences for the absence of endorsement, that requirement is met with respect to the use of an electronic transferable record when information relating to [the endorsement] [the intention to endorse] is [logically associated or otherwise linked to] [included in] that electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9."

Remarks

22. Draft article 22 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 95-97).

23. Draft article 22 highlights the elements necessary for endorsement while retaining the reference to compliance with the requirements for functional equivalence of written form and signature.

24. The Working Group may wish to consider whether the words [the intention to endorse] better reflect the fact that the endorsement takes effect only after the information relating to the intention to endorse is logically associated to the electronic transferable record.

25. The words [or permits] have been added to ensure that cases where the law provides consequences, but does not require an endorsement would also be captured.

26. The words [logically associated or otherwise linked to] are the same terms that refer to the inclusion of information in an electronic transferable record in the definition of "electronic record" contained in draft article 3. The words [included in] are the same terms that refer to the inclusion of information in an electronic transferable record currently used in draft article 24 with respect to amendment of

an electronic transferable record and in other draft provisions. The Working Group may wish to consider which terms are more appropriate and provide guidance on their uniform use in the draft provisions.

27. The Working Group may wish to confirm that issues relating to the validity of an endorsement remain a matter of substantive law.

"***Draft article 23. Transfer of an electronic transferable record***

"1. [To transfer the electronic transferable record, the holder shall transfer the control of the record to the transferee.] [An electronic transferable record is transferred with the transfer of control from the holder to the transferee.]

"2. [[Subject to any rule of law governing the transfer of a paper-based transferable document or instrument] [When permissible under applicable law], the holder may:

(a) Transfer to a named person an electronic transferable record issued or transferred to bearer; or

(b) Transfer to bearer an electronic transferable record issued or transferred to a named person.]"

Remarks

28. Draft article 23 has been recast in light of the deliberations of the Working Group at its forty-eighth session (A/CN.9/797, paras. 98-100).

29. The Working Group may wish to consider adopting standard language for reference to non-mandatory legal requirements (i.e., cases in which the law permits but does not require a certain activity, such as those dealt with in draft articles 15, 22, 23, 24, 25, 27, 28 and 29).

30. Paragraph 2 deals with the possibility for the holder to change the rules for circulation of an electronic transferable record issued to bearer in an electronic transferable record to a named person and with the reverse case ("blank endorsement").

31. The bracketed text in paragraph 2 aims at highlighting the fact that the change in the rules for transfer of the electronic transferable record (i.e., to bearer or to order) must be permissible under applicable substantive law. Differences between the two sets of bracketed text are intended to be editorial only.

32. The Working Group may wish to note that a provision dealing with the possibility of issuing electronic transferable records to bearer has been deleted as that possibility was encompassed in draft article 1, paragraph 2 (A/CN.9/797, para. 65). Accordingly, the Working Group may wish to consider deleting draft article 23, paragraph 2 (A/CN.9/797, para. 99) and clarifying the matter in the explanatory material.

"***Draft article 24. Amendment of an electronic transferable record***

"1. Where the law requires [or permits] the amendment of a paper-based transferable document or instrument [or provides consequences for the absence of an amendment], a reliable method shall be employed for amendment of

information in an electronic transferable record whereby [all] the amended information is [accurately] reflected in the electronic transferable record and is readily identifiable as such.

"2. Upon amendment, a statement to the effect that an amendment has taken place shall be included in the electronic transferable record."

Remarks

33. Draft article 24 has been recast in light of the suggestions received at the forty-eighth session (A/CN.9/797, para. 101). It provides a functional equivalence rule for instances in which an electronic transferable record may be amended.

34. The Working Group may wish to clarify whether all modifications entered in the electronic transferable record after its issuance would be considered an amendment and should therefore satisfy the requirements set forth in draft article 24.

35. The words [or permits] aim at capturing those instances in which applicable substantive law allows for amendment of the electronic transferable record by virtue of party autonomy but does not require it.

36. The words [all] and [accurately] aim at providing drafting options to introduce a duty to document any relevant change in the information contained in the electronic transferable record (A/CN.9/797, para. 72). If draft article 24 applied to all cases of amendment of an electronic transferable record, it could ensure, for instance, proper documentation of the chain of endorsements for an action of recourse (see A/CN.9/WG.IV/WP.124/Add.1, para. 15 and A/CN.9/797, para. 101, subpara. (a)).

37. Draft paragraph 2 aims at satisfying the goal of documenting changes to the electronic transferable record by requiring a statement relating to the amendment. That information requirement might not exist with respect to paper-based transferable documents or instruments due to the fact that amendments on paper are visible as such.

38. The Working Group may wish to consider whether a general standard reliability in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58) would apply to draft article 24 or whether a separate standard should be included in this draft article.

"***Draft article 25. Reissuance***

"1. When the law permits the reissuance of a paper-based transferable document or instrument, an electronic transferable record may be reissued.

"2. Upon reissuance of an electronic transferable record, a statement to the effect that a reissuance has taken place shall be included in the electronic transferable record."

Remarks

39. Draft article 25 has been recast in light of the suggestions at the forty-eighth session (A/CN.9/797, para. 104). It now aims at providing a general rule on reissuance of electronic transferable records, which is possible whenever

allowed by substantive law. The Working Group may wish to clarify that the provision would apply to issues specific to the use of electronic means, such as the corruption of the method of control of an electronic transferable record.

"***Draft article 26. Replacement***

"1. If a paper-based transferable document or instrument has been issued and the holder and the [issuer/obligor] agree to replace that document or instrument with an electronic transferable record:

(a) The holder shall [present] [surrender] [for replacement] the paper-based transferable document or instrument to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the paper-based transferable document or instrument, an electronic transferable record that includes all information contained in the paper-based transferable document or instrument and a statement to the effect that it replaced the paper-based transferable document or instrument; and

(c) [After] [Upon] issuance of the electronic transferable record, the paper-based transferable document or instrument ceases to have any effect or validity.

"2. If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to replace that electronic transferable record with a paper-based document or instrument:

(a) The holder shall [present] [surrender] [for replacement] [transfer control of] the electronic transferable record to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the electronic transferable record, a paper-based document or instrument that includes all information contained in the electronic transferable record and a statement to the effect that it replaced the electronic transferable record; and

(c) [After] [Upon] issuance of the paper-based document or instrument, the electronic transferable record ceases to have any effect or validity.

"3. Parties may consent to replacement at any time prior [or simultaneously] to the replacement.

"4. Replacement according to paragraphs 1 and 2 does not affect the rights and obligations of the parties.

"5. If, in accordance with the procedure set forth in paragraph 1, a paper-based transferable document or instrument has been [terminated] [invalidated], but the issuance of an electronic transferable record has not been perfected for technical reasons, the paper-based transferable document or instrument may be reissued in its original medium [or the replacing electronic transferable record may be issued].

"6. If, in accordance with the procedure set forth in paragraph 2, an electronic transferable record has been [terminated] [invalidated], but the issuance of a paper-based transferable document or instrument has not been perfected for technical reasons, the electronic transferable record may be

reissued in its original medium [or the replacing paper-based transferable document or instrument may be issued]."

Remarks

40. Draft article 26 reflects the suggestions at its forty-eighth session (A/CN.9/797, paras. 102-103).

41. The Working Group may wish to consider whether the word [upon] should be replaced by the word [after] to more accurately indicate that cessation of validity and effect is subject to successful issuance of the replacing record, or document or instrument. Alternatively, the Working Group may wish to consider specifying in draft article 26 that the replaced record, or document or instrument, will cease to have effect or validity only after issuance of its replacement.

42. The Working Group may wish to clarify whether the term "all information" in subparagraph 2(b) refers only to substantive information or includes also technical information specific to the electronic medium (A/CN.9/797, para. 103).

43. The Working Group may wish to further discuss which parties, in addition to the holder, ought to consent to or otherwise be involved in the replacement as it is unlikely that the substantive law would have any provision regarding the change of medium (A/CN.9/761, para. 76). While a replacement would generally require the consent of the obligor(s), the obligor would, in such a case, be able to request a replacement when the document, instrument or record for performance is presented (A/CN.9/768, para. 101). Thus, requiring the obligor's consent for replacement prior to presentation might not be necessary.

44. The Working Group may wish to consider paragraph 3 in conjunction with draft article 14 providing a general rule on consent requirement. It should be noted that paragraph 3 aims at providing the possibility of prior consent to replacement.

45. The Working Group may wish to consider whether to retain paragraph 4, whose purpose is to clarify that substantive rights and obligations are not affected by replacement, or to include such clarification in the explanatory material.

46. Draft article 26, paragraphs 5 and 6 deal with the case in which during the replacement the pre-existing transferable document or instrument, or the electronic transferable record has been destroyed, but for technical reasons the corresponding record, document or instrument has not been issued. Such rule may not be contained in substantive law since it is specific to replacement involving an electronic transferable record.

47. The Working Group may wish to consider whether the word [terminated] is adequate for the purpose of paragraphs 5 and 6, which refers to situations where the paper-based transferable documents or instrument or the electronic transferable record ceases to have any effect or validity as mentioned in subparagraphs 1(c) and 2(c). The word [invalidated] might be another drafting option.

"***Draft article 27. Division and consolidation of an electronic transferable record***

"1. Where the law permits the division or consolidation of a paper-based transferable document or instrument, a reliable method for division or consolidation of an electronic transferable record shall be provided.

"2. If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to divide the electronic transferable record into two or more electronic transferable records:

(a) The holder shall [transfer] [present for division] the electronic transferable record to the [issuer/obligor];

(b) Two or more new electronic transferable records shall be issued and include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the pre-existing electronic transferable record and the new electronic transferable records; and

(c) Upon division, the pre-existing electronic transferable record ceases to have any effect or validity and shall include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the resulting new electronic transferable records.

"3. If the holder of two or more electronic transferable records, the [issuer/obligor] of which is the same, agrees with the [issuer/obligor] to consolidate the electronic transferable records into a single electronic transferable record:

(a) The holder shall [transfer] [present for consolidation] the electronic transferable records to the [issuer/obligor];

(b) The consolidated electronic transferable record shall be issued and include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the pre-existing electronic transferable records;

(c) Upon consolidation, the pre-existing electronic transferable records cease to have any effect or validity and shall include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the consolidated electronic transferable record."

Remarks

48. Draft article 27 reflects the Working Group's suggestions at its forty-eighth session (A/CN.9/797, para. 106). In deliberating, the Working Group may wish to refer also to the considerations expressed in A/CN.9/WG.IV/WP.124/Add.1, paragraphs 33-34. The word [transfer] is suggested instead of the word [present] to avoid reference to substantive law notions.

"***Draft article 28. Termination of an electronic transferable record***

"1. Where the law requires or permits the termination of a paper-based transferable document or instrument, a reliable method shall be provided to prevent further circulation of the electronic transferable record.

"2. Where the law requires that a statement to indicate the termination of a paper-based transferable document or instrument be included in the document or instrument, that requirement is met by including a statement in the electronic transferable record to the effect that it has been terminated."

Remarks

49. Draft article 28 reflects the suggestions at the forty-eighth session (A/CN.9/797, para. 106). It now contains a general functional equivalence rule.

50. The Working Group may wish to consider whether a general standard of reliability in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58) would apply to draft article 28 or whether a separate standard should be included in this draft article.

"***Draft article 29. Use of an electronic transferable record for security right purposes***

"Where the law permits the use of a paper-based transferable document or instrument for security right purposes, a reliable method to allow the use of electronic transferable records for security right purposes shall be provided."

Remarks

51. Draft article 29 reflects the suggestion made at the forty-eighth session that it should be formulated as a functional equivalence rule (A/CN.9/797, para. 106).

52. The Working Group may wish to consider whether a general standard of reliability in draft article 11 of Option C (A/CN.9/WG.IV/WP.128, paras. 56-58) would apply to draft article 29 or whether a separate standard should be included in this draft article.

"***Draft article 30. Retention of [information in] an electronic transferable record***

"1. Where the law requires that a paper-based transferable document or instrument [or information therein] be retained, that requirement is met by retaining an electronic transferable record [or information therein] if the following conditions are satisfied:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) The integrity of the electronic transferable record is assured in accordance with draft article 12 of Option A [, apart from any change that arises from the need to ensure that the record may not further circulate];

[(c) Information [, if any,] enabling the identification of the issuer and holder of the electronic transferable record and the date and time when it was issued and transferred as well as when [it ceases to have any effect or validity][it is terminated] is made available;]

(d) The electronic transferable record is retained in the format in which it was generated, transferred and presented for performance, or in a format

which can be demonstrated to represent accurately the information generated, sent or received; and

[(e) Information enabling the identification of the parties involved in the life cycle of the electronic transferable record and the date and time of their involvement is made available.]

"2. A person may satisfy the requirement referred to in paragraph (1) by using the services of a third party, provided that the conditions set forth in subparagraphs (a)-(e) of paragraph 1 are met."

Remarks

53. Draft article 30 aims at introducing a general rule on retention of electronic transferable records. It is based on article 10 of the UNCITRAL Model Law on Electronic Commerce.

54. The words [, apart from any change that arises from the need to ensure that the record may not further circulate] were added in paragraph 1(b) to reflect the fact that the retained electronic transferable record may no longer circulate.

55. Additional requirements have been added in light of the importance attributed to the accurate recording of the information relating to the circulation of the electronic transferable record (A/CN.9/797, para. 72).

56. The Working Group may wish to consider whether subparagraphs 1(c) and 1(e) should be deleted as they specify the condition expressed in subparagraph 1(b). In that case, the Working Group may wish to consider whether a corresponding comment should be added to the explanatory material.

57. The Working Group may also wish to consider whether the words [, if any,] should be retained in paragraph 1(c) in light of the possibility of issuing and transferring an electronic transferable record to bearer (and not to a named person).

58. The Working Group may wish to consider whether a specific provision on the duty of retention in case of replacement should be added to the draft provisions (A/CN.9/797, para. 104, subpara. (b) and A/CN.9/124/Add.1, para. 43). In that case, the Working Group may wish to consider if that provision should extend also to retention of paper-based transferable documents or instruments, given that substantive law is not likely to provide for replacement, which involves the electronic medium.

D. Third-party service providers

"***Draft article 31. Conduct of a third-party service provider***

"Where a third-party service provider supports the use of an electronic transferable record, that third-party service provider shall:

(a) Act in accordance with statements made by it with respect to its policies and practices;

(b) Exercise reasonable care to ensure the accuracy of all statements made by it;

(c) Provide reasonably accessible means that enable a relying party to ascertain from an electronic transferable record information about it;

(d) Provide reasonably accessible means that enable a relying party to ascertain, where relevant, from an electronic transferable record:

(i) The method used to identify the [issuer/obligor] and the holder;

(ii) That the electronic transferable record retained its integrity and has not been compromised;

(iii) Any limitation on the scope or extent of liability stipulated by the third-party service provider;

(e) Use trustworthy systems, procedures and human resources in performing its services."

"***Draft article 32. Trustworthiness***

"For the purposes of article 31, subparagraph (e) in determining whether, or to what extent, any systems, procedures and human resources utilized by a third-party service provider are trustworthy, regard may be had to the following factors:

(a) Financial and human resources, including existence of assets;

(b) Quality of hardware and software systems;

(c) Procedures for processing of electronic transferable record;

(d) Availability of information to related parties;

(e) Regularity and extent of audit by an independent body;

(f) The existence of a declaration by the State, an accreditation body or the third-party service provider regarding compliance with or existence of the foregoing; and

(g) Any other relevant factor."

59. Based on articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures, draft articles 31 and 32 on third-party service providers had already been revised in light of the considerations by the Working Group, bearing in mind the principle of technological neutrality (A/CN.9/768, paras. 107-110). They are provided for guidance purposes only, encompassing all third-party service providers (A/CN.9/761, para. 27).

60. The placement of these draft articles would depend on the final form of the draft provisions. Moreover, it was suggested that those draft articles ought to be placed in an explanatory note as they are regulatory in nature (A/CN.9/797, para. 107).

61. The Working Group may also wish to clarify the meaning of the term "relying party" in draft article 31 (A/CN.9/797, para. 107).

E. Cross-border recognition of electronic transferable records

"***Draft article 33. Non-discrimination of foreign electronic transferable records***

"1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used in a foreign State [, or that its issuance or use involved the services of a third party based, in part or wholly, in a foreign States] [, if it offers a substantially equivalent level of reliability].

"2. Nothing in this Law affects the application of rules of private international law governing a paper-based transferable document or instrument to electronic transferable records."

Remarks

62. At the forty-fifth session of the Commission in 2012, the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.[1] The Working Group also reiterated the importance of cross-border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

63. Draft article 33 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from its electronic nature.

64. The Working Group may wish to clarify if, for instance, under draft article 33, an electronic transferable record issued in a jurisdiction that does not permit the issuance and use of electronic transferable records, but otherwise compliant with substantive law requirements of that jurisdiction, could be recognized in another jurisdiction enacting draft article 33.

65. The Working Group may wish to consider whether a requirement of substantially equivalent level of reliability should be introduced in the draft provisions. The words [, if it offers a substantially equivalent level of reliability] may be found in article 12, paragraph 3 of the UNCITRAL Model Law on Electronic Signatures.

66. Paragraph 2 reflects the Working Group's understanding that the draft provisions should not displace existing private international law applicable to paper-based transferable documents or instruments (A/CN.9/768, para. 111).

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[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 83.